

Final

**RHODE ISLAND SUPREME COURT  
ETHICS ADVISORY PANEL  
Opinion 98-03 - Request 733  
Issued February 19, 1998**

Facts:

The inquiring attorney proposes to telephone a *pro se* appellee to offer to represent the appellee at no fee. The inquiring attorney states that his/her sole motive in soliciting the representation is to gain the appellate experience necessary to qualify for the Rhode Island Supreme Court's appointment list for handling criminal appeals. Attorneys on the list who are so appointed are compensated for the legal services they provide.

Issue Presented:

The inquiring attorney asks whether the proposed solicitation violates Rule 7.3(a) of the Rules of Professional Conduct.

Opinion:

The proposed telephone solicitation is a violation of Rule 7.3(a).

Reasoning:

Rule 7.3(a) prohibits in-person solicitation of employment from a prospective client with whom lawyer has no family or prior professional relationship when a significant motive is the lawyer's own pecuniary gain. The rule states:

**Rule 7.3. Direct Contact with Prospective Clients. -**

(a) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, or by other communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule.

It is assumed that the person to be solicited has no family or prior professional relationship with the inquiring attorney.

In-person and live telephone communications by lawyers present inherent dangers of pressure and undue influence in a private encounter between a lay person in need of legal ser-

vices and a trained advocate. The official commentary to Rule 7.3 provides:



There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter....

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

In Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) the United States Supreme Court upheld the state of Ohio's blanket prohibition against all forms of in-person solicitation by lawyers for pecuniary gain. The lawyer in Ohralik, after having learned about an automobile accident, approached the driver while she was lying in traction in a hospital bed and asked her to sign a contingency fee agreement. The lawyer also went to the passenger's home. Eventually he obtained an agreement from both injured persons to engage him on a contingent-fee basis. Upholding the state's suspension of the lawyer, the Supreme Court held that a state may discipline a lawyer "for soliciting clients in person, for pecuniary gain, under circumstances likely to impose dangers that the State has a right to prevent." Id. at 449. The Court cited the state's responsibility for maintaining professional standards, and preventing solicitation that involves "fraud, intimidation, overreaching, and other forms of vexatious conduct." Id. at 462. The Supreme Court concluded that a state may adopt a prophylactic rule categorically banning all in-person solicitations and may constitutionally sanction lawyers who violate them even in the absence of actual proof or findings of harm or injury. Id. at 466-67. The Court reiterated that states may categorically ban in-person solicitation by lawyers for profit in Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) in which the Court decided that states may not prohibit targeted direct mail solicitation because it is afforded some protection as commercial speech under the First Amendment.

The Supreme Court has limited the restrictions states may place on lawyer solicitation when the right of association is involved. See NAACP v. Button, 371 U.S. 415 (1963) (solicitation by NAACP lawyers of victims of racial discrimination to participate in civil rights cases protected by First Amendment.) On the same day Ohralik was decided, the Supreme Court also decided In re Primus, 436 U.S. 412 (1978). In Primus, an American Civil Liberties Union lawyer, after speaking to a group of welfare mothers who had been sterilized as a condition of continued receipt of welfare benefits, wrote a letter to one of the attendees, advising her that the ACLU had agreed to represent the sterilized women at no fee. The lawyer was disciplined for soliciting a client on behalf of the ACLU. The Supreme Court reversed the sanction order and held that the state's application of the solicitation rules violated the First and Fourteenth

Amendments to the Constitution. Finding that the solicitation was protected by the First



Amendment rights of expression and association, the Court stated that the lawyer's actions were "undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain." *Id.* at 422. Courts have held that direct solicitations involving associational activities are constitutionally protected even when there was a significant motive for pecuniary gain. See *In re Teichner*, 387 N.E.2d 265 (Ill. 1979); *In re Appert*, 315 N.W. 2d 204 (Minn. 1980).

Turning to the instant inquiry, the Panel notes that the inquiring attorney proposes to telephone a *pro se* appellee to offer to represent him/her on a *pro bono publico* basis. The attorney candidly admits that the sole motive for soliciting the representation is to qualify for the court-appointed list for criminal appellate matters. If as the inquiring attorney represents, a significant motive for the solicitation is the personal gain of the inquiring attorney in qualifying for future employment and the eventual pecuniary benefit to be derived therefrom, then the Panel is of the opinion that the proposed conduct is an impermissible solicitation. As such, the Panel believes that the attorney's proposed conduct presents the same dangers that the ban on in-person and live telephone communications seeks to prevent. The Panel also finds that the proposed solicitation does not involve political expression or the exercise of associational activities. Mindful that its jurisdiction is limited to interpretation of the Rules of Professional Conduct and that the constitutionality of the prohibition of the proposed solicitation must ultimately be determined by the courts, the Panel is of the opinion that the solicitation is not constitutionally protected.

The Panel therefore concludes that the inquiring attorney's proposed telephone solicitation of a *pro se* appellee would be a violation of Rule 7.3(a). The Panel advises that a direct mail solicitation would be permitted, subject to the reasonable restrictions set forth in Rule 7.3(b).